UNITED NATIONS ENVIRONMENT PROGRAMME

ECONOMIC & SOCIAL COMMISSION FOR ASIA AND THE PACIFIC

SOUTH PACIFIC COMMISSION

SOUTH PACIFIC BUREAU FOR ECONOMIC CO-OPERATION

South Pacific Regional Environment Programme

SPREP/Topic Review 21
Original: English
Summary also included in French

TOPIC REVIEW No. 21

CUSTOMARY LAW RELATING TO THE ENVIRONMENT

South Pacific Commission
Noumea, New Caledonia
April 1985

This document was prepared by SPC under project FP/0503-79-15 as a contribution to the development of a South Pacific Regional Environment Programme. Its contents, conclusions and recommendations do not necessarily reflect the views of UNEP, ESCAP, SPEC or SPC.

Original Text : English.

Original edition

Prepared for publication at

South Pacific Commission Headquarters, Noumea,

New Caledonia,

and printed at

The Environment Centre (N.S.W.) Pty. Ltd.

For bibliographic purposes, this document may be cited as :

SPC/ SPEC / ESCAP / UNEP : Customary Law Relating to the Environment, Topic Review No. 21, SPREP, 1985

SOUTH PACIFIC REGIONAL ENVIRONMENT PROGRAMME

CUSTOMARY LAW RELATING TO THE ENVIRONMENT SOUTH PACIFIC REGION 'AN OVERVIEW'

Mere Pulea
Mere Pulea and Associates,
Fiji

SOUTH PACIFIC COMMISSION,
NOUMEA, NEW CALEDONIA.
May 1985.
Reprinted July 1987

PREFACE

Twelve years ago the United Nations Conference on the Human Environment (Stockholm, 5-16 June, 1972) adopted the Action Plan for the Human Environment, including the General Principles for Assessment and Control of Marine Pollution. In the light of the results of the Stockholm Conference, the United Nations General Assembly decided to establish the United Nations Environment Programme (UNEP) to " serve as a focal point for environmental action and co-ordination within the United Nations system " (General Assembly resolution XXVII of 15 December, 1972). The organizations of the United Nations system were invited to " adopt the measures that may be required to undertake concerted and co-ordinated programmes with regard to international environmental problems " and the " intergovernmental and non-governmental " were also invited "to lend their full support and collaboration to the United Nations with a view to achieving the largest possible degree of co-operation and co-ordination". Subsequently, the Governing Council of UNEP chose " Oceans " as one of the priority areas on which it would focus efforts to fulfil its catalytic and co-ordinating role.

The Regional Seas Programme was initiated by UNEP in 1974. Since then the Governing Council of UNEP has repeatedly endorsed a regional approach to the control of marine pollution and the management of marine and coastal resources and has requested the development of regional action plans.

The Regional Seas Programme at present includes eleven regions (1) and has over 120 coastal States participating in it. It is conceived as an action-oriented programme having concern not only for the consequences but also for the causes of environmental degradation and encompassing a comprehensive approach to combating environmental problems through the management of marine and coastal areas. Each regional action plan is formulated according to the needs of the region as perceived by the Governments concerned. It is designed to link assessment of the quality of the marine environment and the causes of its deterioration with activities for the management and development of the marine and coastal environment. The action plans promote the parallel development of regional legal agreements and of action-oriented programme activities (2).

---

(1) Mediterranean, Kuwait Action Plan Region, West and Central Africa, Wider Caribbean, East Asian Seas, South-East Pacific, South Pacific, Red Sea and Gulf of Aden, East Africa, South-West Atlantic and South Asian Seas.

(2) UNEP : Achievments and planned development of UNEP's Regional Seas Programme and comparable programmes sponsored by other bodies. UNEP Regional Seas Reports and Studies No. 1, UNEP, 1982.

The idea for a regional South Pacific environment management programme came from the South Pacific Commission (SPC) in 1974. Consultations between SPC and UNEP led, in 1975, to the suggestion of organizing a South Pacific Conference on the Human Environment. The South Pacific Bureau for Economic Co-operation (SPEC) and the Economic and Social Commission for Asia and the Pacific (ESCAP) soon joined SPC's initiative and UNEP supported the development of what became known as the South Pacific Regional Environment Programme (SPREP) as part of its Regional Seas Programme.

A Co-ordinating Group, consisting of representatives from SPC, SPEC, ESCAP and UNEP was established in 1980 to co-ordinate the preparations for the Conference.

The Conference on the Human Environment in the South Pacific was convened in Rarotonga (8-11 March, 1982), It adopted : the South Pacific Declaration on Natural Resources and Environment of the South Pacific Region ; and agreed on the administrative and financial arrangements needed to support the implementation of the Action Plan and on the workplan for the next phase of SPREP (3).

To facilitate the Action Plan, this report has been produced by Mere Pulea and the sponsors would like to express their gratitude to her.

---

(3) SPC / SPEC / ESCAP / UNEP : Action Plan for Managing the Natural Resources and Environment of the South Pacific Region. UNEP Regional Seas Reports and Studies No. 29, UNEP, 1983.

Customary Law Relating to the Environment

Abstract

Before attempting to discuss the issues of customary law and the environment, let us first of all attempt to define what we mean by custom and customary law.

What is custom? Is custom a set of written or unwritten rules to which people must conform, or is it a ritual or process where conformity is vital for the practice of that particular activity or custom whether it be social as found in the customs of marriage, or economic as found in the various customary practices of traditional fishing and management of resources? Custom is all these things.

Further, does custom dictate patterns of behaviour, the violation of which invokes action to bring about obedience; or is it a process or way of solving disputes through rituals of apologies, compensation or redress? Does custom evolve through a particular form or procedure, or simply through long usage and final recognition as such?

Some writers claim that unwritten customary law is a part of a people's culture which has been handed down since time immemorial, but adapts to meet the particular needs of the people in times of change. Other writers however, claim that what men call customary law, customary land rights, and so-called vacant and waste-land, were in fact all invented by colonial codification.

In spite of the changes brought about by the written law to regulate or obliterate some of the basic customary law and practices of the people as found in traditional systems of environmental management, customary law and practices tend to continue as part of people's way of life. The existence and continuation of the body of customary law not only serves to maintain tradition, but can also be effectively linked into the nexus of development and protection of the environment.

Customary law, practices and institutions cannot yet be replaced by written legislations, administrative directions and formal courts as customary law continues to be

> the primitive counterpart of a Record Office in which parchment has not yet replaced the memory of men.

DROIT COUTUMIER ET ENVIRONNEMENT

- R E S U M E -

Avant d'essayer de traiter des problèmes du droit coutumier et de l'environnement, il convient de proposer une définition de la coutume et du droit coutumier.

Qu'est-ce que la coutume? Est-ce un ensemble de règles, écrites ou non, auxquelles les gens doivent se conformer, ou est-ce un rite ou un processus dont le respect est capital pour l'exercice d'une activité ou coutume donnée, qu'elle soit d'ordre social comme les coutumes du mariage, ou d'ordre économique comme les diverses pratiques coutumières de la pêche traditionnelle et de la gestion traditionnelle des ressources? En fait, la coutume c'est tout cela à la fois.

Par ailleurs, la coutume impose-t-elle un mode de comportement dont le non-respect entraîne des mesures coercitives ou est-elle un moyen de régler des conflits par des cérémonies d'excuse, de dédommagement ou de réparation? La coutume résulte-t-elle d'une forme ou d'un processus particuliers ou est-elle simplement l'aboutissement d'usages ancestraux débouchant en fin de compte sur une reconnaissance du phénomène en tant que tel?

Selon certains auteurs, le droit coutumier non écrit fait partie de la culture populaire après avoir été transmis depuis des temps immémoriaux, mais il s'adapte aux besoins spécifiques des gens dans les périodes d'évolution. Pour d'autres cependant, ce que les hommes appellent droit coutumier, droits fonciers coutumiers et les notions de terres non occupées ou en friche relèvent en fait d'une codification inventée par le régime colonial.

Malgré les changements introduits par le droit écrit pour contrôler ou faire disparaître certains des droits et pratiques coutumiers fondamentaux que l'on trouve dans les systèmes traditionnels de gestion de l'environnement, les droits et pratiques coutumiers se maintiennent et font partie intégrante du mode de vie des gens. L'existence et la pérennité de l'ensemble des droits coutumiers servent non seulement à préserver la tradition, mais peuvent aussi être rattachées à la mise en valeur et à la protection de l'environnement.

Le droit coutumier, les pratiques et les institutions coutumières ne peuvent pas être remplacés par des dispositions législatives écrites, par des instructions administratives et

.../...

par des tribunaux "classiques", car le droit coutumier est toujours :

> l'équivalent primitif d'un service des archives où le parchemin n'a pas encore remplacé la mémoire de l'homme.

CONTENTS

CUSTOMARY LAW RELATING TO THE ENVIRONMENT

AN OVERVIEW

I. Introduction

1. In the 'Overview of Environmental Protection Legislation in the South Pacific Countries' compiled by Venkatesh and Va'ai in June 1981 for the South Pacific Regional Environment Programme (SPREP), a number of important recommendations were made. Amongst these was the need to identify "existing customary controls relevant to the protection and conservation of the environment" and "for legislation to be effective they must, as far as possible, be harmonized with customary practices to ensure that they are effective and can be enforced"[1].

2. The South Pacific Commission has defined the task for this paper as:-

> collect and collate information on customary law and practices relevant to the protection of the coastal and marine environment of the South Pacific Region.

3. It is necessary however, to give some attention to the existing legal systems and other relevant contributions of law in order to assess the role of customary law and practices within the existing legal systems in the Pacific.

4. The focus on customary law seems to have arisen directly with the emergence of independence in some Pacific countries and dissatisfaction with the inherited legal systems. Writers such as Narakobi claim that the "external legal order with its own prejudices and pre-conceived notions comes into conflict with the traditional legal system"[2]. This raises for question the framework in which we attempt to examine customary law and development theories in a Pacific island context and the opportunities that exist for the development of customary law as common law (i.e.not statute law). To this end, the paper will focus on the role and scope of customary law; the incorporation of customary law into the legal system; basis of tenure; and the main categories of customary rights and practices to land, coastal and marine resources.

5. Resource material for this paper has been taken from works of writers on the subject; traditional elders recognized to be repositories of customary law; national constitutions and legislations; the judgements of the courts; and the writer's experiences as a Pacific Island lawyer. These form the main basis for the statements of principles.

II. WHAT IS CUSTOMARY LAW ?

6. Since independence from colonial administration, the search for a more meaningful legal system in some countries has included, amongst other things, the incorporation of customary law into the formal legal system. But what is customary law? If we are to investigate customary law when and where do we find it? Is it the traditional or ancient law; or the law administered by customary courts; or current customary law; or just unwritten custom?

7. The term 'customary law' used in this paper is a generic one whose source is found in both written and unwritten forms. The range does not only cover customary practices but patterns of behaviour and social norms, the violation of which invokes coercive procedures. In some countries, customary law and practices are codified. Where no codification exists, customary law for any particular area becomes even more difficult to define as wide ranging variations consisting of a variety of different principles, norms and rules are known to exist in one small area or community. On the other hand, custom may not be a set of rules but a process or way of solving or providing alternatives to problems. Some of the rules or ways of solving problems state wide and general principles of morality and public policy and constitute a framework for justice. Not only are customary laws changing today, they are subject to different kinds of changes.

8. In search for a definition of customary law, Hoebel[3] defines 'law' thus:- "a social norm is legal if its neglect or infraction is regularly met in threat or in fact by the application of physical force by an individual or group

possessing the socially recognized privilege of so acting". Kobben[4] states that this definition, the core of which lies in the words 'physical force', is in accordance with what is usually considered law in western society. The disadvantage of this definition, he states, is that:-

> it is too western to be suitable for intercultural use. However, the broad interpretation of the definition applies in particular to the words 'socially recognized privilege'. In ... society... when an aggrieved individual himself takes action to redress a wrong ... Hoebel regards this as a legal deed provided the individual enjoys the approval or tacit support of public opinion. In situations like these, public opinion, he reasons, functions as a court; the individual taking action acts as a public official pro tempore, pro eo solo delicto.

9. Whether Hoebel's definition could be considered appropriate for a definition of 'law' in Pacific societies opens the way for further examination.

10. Kobben[5] also considered Pospisil's definition where "law is conceived as rules or modes of conduct made obligatory by some sanction which is imposed and enforced for their violation by a controlling authority." The term 'law' in this definition is also used when the sanctions are of a psychological nature such as ostracism, ridicule, avoidance or denials of favours. To Pospisil, the effects of the sanction is more important than its form. He reasons that psychological sanctions often exercise as strong a control as do physical sanctions. The effect of economic and political sanctions cannot be overlooked.

11. Not only do sanctions of a physical nature as described by Hoebel or of a psychological nature as described by Pospisil fall within the ambit of what might be considered 'law' in Pacific societies, but a much wider interpretation such as the role of religio-magical or supernatural sanctions might also be considered.

12. It could be said that the fear of supernatural retribution is actually a part of Pacific island 'law'. The punishment bringing about illness, death or misfortune not only to the offender but to his kin group or community is an effective force in maintaining standards of social behaviour. Conformity and co-operation therefore is vital not only for social, economic and political activities, it is vital to the cohesiveness of the group and well being of

the community. The threat of supernatural retribution in some Pacific societies is quite well known in the promotion of health, sanitation, conservation and management of natural resources. In some communities, animals are associated with ancestors and therefore are not killed or eaten. Plants associated with burial grounds and cult sites are given protection. To persons who damage crops, plants and trees or defecate on the land of others this threat of bad magic could be said to promote conservation and sanitation.

13. Closely related to these elements that could be described as 'law', are other aspects such as the exposure to ridicule through song and dance which could convey to the individual or group, contempt for certain behaviour or actions. There are numerous examples which illustrate this in Pacific societies. In addition to this is the mediation of disputes, compensation and exile. Although exile is less known these days in Pacific communities, it has existed in the past (e.g. for acts of adultery) as a method of avoiding trouble or as a punishment for making it. The mediation of disputes often follows numerous acts of transgression. The range is wide and covers such acts as elopement, adultery, stealing, incest, quarrelling, controversy over land, fishing, forestry rights and so forth. Certain acts such as quarrelling, elopement or stealing, for example, are usually handled by family members of the offender with appropriate gifts and apology rituals in order to seek the goodwill and forgiveness of the injured party. Often through the mediation of dispute, if the injured party, the offender and the community feels that redress made in kind is also appropriate, compensation is usually made. Compensation is not made according to set procedures nor is it regular or systematic but only what is considered reasonable, just and proper by the injured party, the group, or the community.

14. Interpreting within these broad terms, what precisely is customary law? There is no single, clear definition. The changes occuring in Pacific societies due to economic and social development and political independence necessitates that customary law be broadly interpreted.

III. PACIFIC LEGAL SYSTEMS TODAY.

15. The legal systems found in Pacific islands today have their basis or are tied in one way or another to colonial legislation. In the main, laws have been inherited from Britain, France, and the United States. The legal systems of Papua New Guinea, Fiji, Tonga, Western Samoa, Tokelau, Niue, the Cook Islands, Nauru, Solomon Islands, Kiribati, Tuvalu and Vanuatu are based on the English system; those of American Samoa, Guam and the United States Trust Territories of the Pacific Islands are based on a mixture of the Continental, Japanese and American systems, although the American system derives its original principles from English common law. New Caledonia, Wallis, Futuna, Tahiti and Vanuatu have systems based on the French Civil Code.

(a) Separate Laws

16. The legal systems however, do not only have sources originating in colonial legislations, but within some countries the colonial legal systems distinguished laws for Europeans and laws for 'natives'. In Fiji for example, a system of separate laws was developed for different ethnic groups. A separate body of laws was set out under the Fijian Affairs Act for Fijians[6]. Co-existing are separate laws passed to protect certain limited interests of groups such as the Banabans[7] and Rotumans[8] but they only apply to the Banabans living on their home island of Rabi and the Rotumans living in Rotuma.

(b)Other Sources

17. Laws of Commonwealth countries such as Australia and New Zealand have also influenced the development of laws in some Pacific Islands. Not only were laws introduced into those territories that were administered by them but also to other countries where they had no jurisdiction. An example of this can be found in the adoption of New Zealand law as part

of the law of Tonga[9].

18. Countries such as Papua New Guinea and Nauru have adopted various Australian statutes such as the Queensland Criminal Code 1899 and Nauru has also adopted legislation from Papua New Guinea such as the Registration of Births, Deaths and Marriages Ordinance 1912 of the Territory of Papua. Also Niue had applied to it the Cook Islands Act 1915 and its many amendments, although the Niue Act 1966 repealed and replaced those provisions in the Cook Islands Act which applied to Niue. Niue has been a self governing state and in free association with New Zealand since 1974 but no New Zealand statutes or subordinate legislation extends to Niue except with 'request and consent' from Niue.

19. The Cook Islands, also a self governing state in free association with New Zealand has as its basis of law the Cook Islands Act 1915 and its subsequent amendments. This Act also provides that the laws of England as existing on the 14th. January 1840 (being the year New Zealand was established as a British colony) also apply. New Zealand statutes if expressly stated, also apply to the Cook Islands. The Cook Islands Act also declared a number of New Zealand Acts to apply.

20. Similarly, in Tokelau, a New Zealand dependency, the Tokelau Island Act 1948 and its amendments form the basis of Tokelau's legislative administrative and judicial systems. The laws of the Gilberts (Kiribati) and Ellice (Tuvalu) Islands colony which were in force in Tokelau immediately before New Zealand assumed responsibility for the administration of the territory were continued in force. Many of these laws became out of date and were replaced by laws more suited to conditions in Tokelau. The laws of England as they existed in 1840 also technically apply to Tokelau except where they are inconsistent with the Tokelau Act 1948 or any other enactment in force in Tokelau. New Zealand statutes do not apply to Tokelau unless expressed to do so.

21. Having briefly portrayed the multiplicity of laws within the existing legal systems, the legal structures in some countries are similarly affected. A brief view with examples will hopefully indicate that Pacific countries have inherited complex legal structures and this must be understood to appreciate the complexities of 'law' in Pacific societies.

(c)Structures and Procedures

22. In some countries, apart from Magistrates Courts, Supreme Courts, High Courts and Courts of Appeals, there are also Village Courts as found in Papua New Guinea, Village and Island Courts in Vanuatu, Tikina and Provincial Courts in Fiji,the Privy Council in Tonga, Land Courts in Niue, Cook Islands, Kiribati; the Lands and Titles Court in Western Samoa; the Lands Committee in Nauru and the Customary Lands Appeal Court in Solomon Islands. These courts do not limit their jurisdiction solely to lands and chiefly or noble titles, but also to compensation, local adoptions, maintenance and divorce and in some cases, minor offences. In countries where there are separate bodies of laws in respect of different ethnic groups as found in Fiji, separate legal structures are also found such as the Lands Court for the Banabans under the Banaban Lands Act. Some of the distinguishing features of these courts as compared to Magistrates Courts and High Courts are that these courts are restricted to nationals; laymen can be used to preside in the proceedings; court penalties are usually low and use can be made of customary law.

23. Not only legal structures within each country are found to be complex, legal procedures in some countries are also found to be complex and burdensome. For example, Tokelau is a territory consisting of three atolls varying in length from 90 meters to 6 kilometers and in width from a few meters to 200 meters with no point rising higher than 5 meters above sea level. It has a population under 2,000. The Tokelau Islands Amendment Act 1970 gave the High Court of Niue, civil and criminal jurisdiction in Tokelau as if that Court had been established as a separate Court of Justice in Tokelau; and the Supreme Court of New Zealand, an original and appellate jurisdiction. One can only speculate on the effect of an over elaborate system in relation to the size and resources of this small group of atoll people.

(d)Traditional Features

24. In addition, there are local traditional features within Pacific systems which are well established and recognized. In Tokelau the Faipule (head of the island) and Pulenuku (head of the village) are traditional roles which are recognised and given some statutory protection in law. Traditional chiefly systems in some countries are given much more effective power than other chiefly bodies. In Vanuatu, provision is made in the Constitution for the National Council of Chiefs to be composed of custom chiefs. One of

the functions of the Council is to discuss all matters relating to custom and tradition not only for the preservation and promotion of culture and languages but also to be consulted on any question relating to tradition and custom in connection with any Bill before Parliament. In Fiji, the Fijian Affairs Act makes provision in respect of the Fijian people for a Council called The Great Council of Chiefs whose duty is to make recommendations and proposals for the benefit of the Fijian people. In Western Samoa, the village Fono (council) is presided over by the Matai (chief) who regularly deals with local offences and with conduct which threatens village harmony. The Fono, described as the 'watchdog of Samoan customs' is the most institutionalized traditional 'court' in the Pacific.

IV. ROLE AND SCOPE OF CUSTOMARY LAW.

25. The fundamental principles relating to the Pacific territories colonised by Britain was that the laws, prevailing in England was extended to them. Where there was unwritten systems of customary laws, special difficulties arose. As far as possible, recognition of some customary law was allowed, subject of course to the over-riding force and effect of the written law and English Common Law and Equity. Thus we are faced with interpreting 'law' as a system of written rules and procedures of litigation in the context of formal courts[10]. However, the introduction of these written laws and their attendant court systems does not necessarily mean that the Pacific societies lacked 'legal' procedures or abstract conceptions of law[11].

26. Western legal concepts that are inherent in our laws today are applied to Pacific societies without much modification. Since legal concepts are defined in relation to a complete system, it is highly unlikely that they should fit into a very different social system precisely and specifically. According to Lord Denning, the English common law cannot be applied to foreign land without considerable qualification.

> It has many principles of manifest justice and good sense which can be applied with advantage to people of every race and colour all the world over; but it also has many refinements, subtleties and technicalities which are not suited to other folk...In these far lands the people must have a law which they understand and which they will respect[12].

Thus Lungsgaarde, refering to the transformations in Gilbertese law, states that "both procedural and substantive aspects of traditional Gilbertese law have been dramatically transformed following the imposition of British political rule over the Gilbert Islands"[13].

(a) Constitutions

27. However, with independence some Pacific countries have been examining their existing legislation and the role that customary law assumes within the legal system. For example, the Law Reform Commission of Papua New Guinea has published several reports advocating the extensive use of customary laws and institutions in the development of their legal system. One of the most interesting and important proposals was made by the Commission in their working paper on the Declaration and Development of the Underlying Law[14]. It

proposes amendment to the Constitution which would give customary law greater prominence, so that if the written law does not determine a matter before the Court, one should first turn to customary law and if customary law was not applicable then the English common law should be applied.

28. The Solomon Islands Constitution makes provision for the inclusion of customary law as part of the law of Solomon Islands, but customary law does not apply if it is inconsistent with the Constitution or an Act of Parliament. An Act of Parliament, however, may provide for the proof and pleading of customary law for any purpose; regulate the manner or the purposes for which customary law may be recognized and provide a resolution to conflicts involving customary laws[15].

29. The Constitution of Vanuatu provides that "if there is no rule of law applicable to a matter before it, a Court shall determine the matter according to substantial justice and wherever possible in conformity with custom." Parliament also makes provision for the "manner of the ascertainment of relevant rules of custom, and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings"[16]. The fourth Principle of Declaration in the Preamble to the Constitution of Kiribati states that-:

> we shall continue to cherish and uphold the customs and traditions of Kiribati.

(b) Statutes and Regulations

30. Where the preservation and/or recognition of customary law is not embodied in the Constitution, some countries have given recognition of certain customs in a range of statutes and regulations, (for example, the Gilbert and Phoenix Islands Lands Code). These are mostly found in laws relating to natural resources such as land, forests, fishing and 'social' legislation relating to adoption, marriage, divorce and maintenance.

31. For example, in Papua New Guinea, the Native Customs Recognition Act which came into force in 1964 was the first comprehensive treatment of the role of custom in the legal system, but according to Weisbrot[17] 'it had little impact on the system.' He states that section 6 of the Act bars recognition of custom where:-

> (a) it is repugnant to the general principle of

> humanity; (b) it is inconsistent with the statute or regulation; (c) it is contrary to public interest or would result in an injustice in a particular case; or (d) it would adversely affect the welfare of a child. Given that so many areas of the law,... are covered by statute, and given the wide scope of the restrictions...it is easy to see why the Act has not resulted in more widespread recognition of local custom. There are numerous cases on record in which the court has refused to recognize custom under either the repugnancy clause or public interest or both. The Act only provides for the circumstances in which custom may be pleaded and recognized, but it does not prescribe that parties should adduce evidence of custom when relevant. The independence constitution of 1975 emerged in its final form after considerable conflict...over the precise role of custom in the emerging legal system.... The pre-eminence of custom found its way into the national goals and directive principles contained in the preamble to the constitution, which are non-justiciable in themselves but are relevant in construing positive law, determining public policy, and formulating a Papua New Guinea common law.

32. In Western Samoa, the Land and Titles Protection Ordinance 1934 gave the Land and Titles Court jurisdiction over disputes affecting all property held according to Samoan custom and succession to Samoan customary land. In disputes over the Matai title, the same Ordinance required the Land and Titles Court to make such orders in respect of titles "as may be necessary to preserve or define the same or the rights or obligations attaching thereto in accordance with customs of the Samoan race and all laws in Samoa with reference thereto."

33. In the Cook Islands, the Cook Islands Act 1915[18] gives recognition to native customs and makes the following provision in relation to land:-

> Every title to and interest in customary land shall be determined according to ancient custom and usage of the Natives of the Cook Islands.

34. In Nauru, the Custom and Adopted Laws Act 1971 and its subsequent amendments makes better provision for the institutions, customs and usages of the Nauruans ... (provided that they are not abolished, altered or limited by any law)... be accorded recognition by any Court and have

full force and effect of law. The Nauru Lands Committee Ordinance 1956-1963 also makes provision for the Nauru Lands Committee to determine questions of ownership, or rights in respect of land... in accordance with the customs and usages of the aboriginal natives of Nauru...[19]

(c) Judgements of Courts

35. The judgements of Courts in some countries have also laid some basis for the statements of principles with regards to customary law. The Kiribati case of Namori Kabuati & Others vs. Bauro Teteka[20] illustrates the problem as to how far the courts are prepared to treat custom as authority. Briefly, in this case, it was contended by the Applicants that the Respondent in building a permanent house 7 to 10 years previously on the area reclaimed by the building of the sea wall was in breach of custom in building a house to the west of a Maneaba and that the land reclaimed belonged not to the Respondent, but to the village as a whole.

36. In his decision, Chief Justice O'Brien Quinn, QC stated that:-

> The learned Attorney-General was called upon by me to address the Court on the question of the application of customary law, and he stated that the Vice-President of the Land Appeals Panel was right when he said that there was nothing here in practice that could be elevated to a custom. Custom must be certain; it is a consensual matter. It was not an inflexible rule of custom that a house should not be built to the west of a Maneaba. The practice is to allow it to happen under certain circumstances, if a person, for example, has a certain position in the Maneaba. These are always consensual matters and not certain customs. It cannot be said that in no circumstances can a house be constructed west of the Maneaba.

37. The principles guiding the Courts about proof as to the existence of customary law was declared by a Gold Coast Privy Council judgement in the case of Angu v. Attah. The rule was that customary law had, in the first instance, to be proved by calling so-called expert witnesses until by frequent proof it became so well established that the Court would take judicial notice of it[21]. Maude states however, that "we have much to learn from recent African experience in perfecting techniques for evaluating the authenticity,

integrity and credibility of oral traditions, as well as for interpreting them, until they are at least as reliable as those employed in the case of written records"[22]. He further states however, "oral traditions are not transmitted from generation to generation unless there is a sufficiently powerful motivation for undertaking such an onerous task; and this did not exist everywhere in the Pacific by any means, though it would appear to have done so over most of Polynesia and Micronesia at least until fairly recent times"[23].

38. In ascertaining current customary usage, the Solomon Islands Land and Titles Act makes provision for the Court to "refer to any books, treatises, reports (whether published or not) or other works of reference, and may accept any matter or thing stated therein as prima facie evidence of the usage in question unless and until the contrary is proved"[24].

39. There are a number of examples found in Pacific countries where the question of customary law has come before the courts and the decisions made can form the basis of authoritative case law. What needs to be done however, is to bring together court decisions on customary law from Pacific countries so that fundamental principles and rules can emerge not only for the guidance of the courts but also for administrators and technical officers and the community as a whole.

V. INCORPORATION OF CUSTOMARY LAW INTO THE LEGAL SYSTEM

40. Reference has been made to national Constitutions and some of the statutory provisions in several Pacific countries for the application of customary law. The court exercising jurisdiction in a matter governed by customary law may be the Lands Appeal Court in Solomon Islands, the Privy Council in Tonga, Village Courts in Papua New Guinea, Village and Island Courts in Vanuatu, Lands Committee in Nauru, Lands Court in Niue, Cook Islands and Kiribati or the Land and Titles Court in Western Samoa. These courts are usually, but not always staffed by lay magistrates or judges (the terminology used varies from country to country.) The lay magistrate is usually held in respect by the community for his knowledge of local custom and tends to look no further than himself and his colleagues for sources of customary law.

(a) Ascertainment of custom

41. The ascertainment of custom by the court is usually a question of fact and not of law as illustrated in the Kiribati case of Namori Kabuati & Others vs. Bauro Teteka[25]. In some countries, provision is made in law for the ascertainment of custom by the court. For example, in Fiji under the Native Lands Act[26]:-

> any dispute arising for legal decision in which the question of the tenure of land amongst native Fijians is relevant, all courts of law shall decide such disputes according to such regulations or native custom and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon.

42. The onus of proving that a customary rule or practice is different from the common law lies with the party pleading the difference. Examples are found in cases involving disputed descent and succession rights to land, or to the clan headship. Proof of custom is usually by evidence of expert witnesses such as elders, village headman or chief or evidence supported by the opinion of assessors or other lay magistrates attending. The Constitution of Vanuatu makes the following provision under Article 49 for the ascertainment of rules of custom-:

> Parliament may provide for the manner of the ascertainment of relevant rules of custom, and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings.

With customary law and practices in some countries not being codified, local courts tend to be consistent with their own decisions and principles. For example in cases of disputed descent in Kiribati a recital of geneology and main historical events are two principle areas of examination. In the Land and Titles Court of Western Samoa, a set of principles relating to leadership qualities and community participation will be investigated in disputes of Matai titles. The important phases of the work of local courts are reasonably well understood by the local people. Because of the non-codification of customary law the varying information on customs and practices has been one of the main reasons for treating points of customary law as questions of fact rather than of law.

43. The problem of ascertainment and application of customary law is complicated because most of these laws are unwritten and reference has to be made to unwritten

sources. Where customary law is given some protection in statutes, such as those found in the Gilbert and Phoenix Islands Lands Code, could it be possible that some of these may be now out of date as customary laws that either regulate behaviour or govern conservation practices and management are undergoing constant change ? For example in Solomon Islands, the use of 'current customary usage' in relation to land provides a broad spectrum of interpretation of current custom.

(b) Special problems

44. Special problems also arise in communities where there are two or more major ethnic groups, or in different indigenous systems of custom, e.g. Vanuatu, Solomon Islands and Papua New Guinea. The question arises as to what and whose customary law and practices should be recorded and applied? Fiji's example of a large Indian immigrant population is a case in point. Would the recording of customary law and practices be selected from the more dominant culture, the indigenous culture, or both? There are a number of examples in the legal systems in the Pacific where there are separate laws as well as separate courts for 'natives' and separate laws and courts for 'Europeans and others'. Little is known of the impact on the judicial system if an expatriate is tried in a local 'native' court. The status of ethnic or religious minority groups could also pose very practical problems.

45. Because of the reliance on oral evidence for the ascertainment of customary law and practices, in time this knowledge could fade because of social changes and increased migration. There are areas of customary law relating to land and marine tenure which require recognition in order to give protection to the traditional practices of the local inhabitants. Conflict between government agencies and local communities have been known in a number of the Pacific islands particularly in the exercising of traditional rights and 'government' rights relating to the resources in development projects. Also too, it may be that custom as applied by the local community is hostile to conservation as found in areas of customary ownership of timber rights. Technical officers in the field have come up against opposition and obstacles because of the significance of customary rules, rituals and taboos have not been understood and their operation overlooked. In this regard, unless customary law and practices has been given recognition and satisfactorily recorded, this will continue to be an area of conflict and concern.

46. The questions of language and terminology need also to be viewed with serious consideration. It may not simply be a matter of expression and definition. For example, ownership right, the right of disposal, or the right of alienation, may not have the same meaning and implications in one customary system of law as in another. The danger of inaccuracies by the use of western language and terminologies could also arise. The slow development of a body of customary 'legal' terminologies carries with it the risk of obscuring the Pacific island sources or overlooking them altogether with the continued use of western legal terms.

47. The problem of the use of customary concepts expressed in the English language was considered by Chief Justice Daly of Solomon Islands in the case of LILO & OTHERS v GHOMO[27] in which he said:-

> the problem is how can one express customary concepts in the English language? The temptation which we all face, and to which we sometimes give in, is to express these concepts in a similar manner to the nearest equivalent concept in the law received by Solomon Islands from elsewhere, that is the rules of common law and equity. The result is sometimes perfectly satisfactory in that the received legal concept and the Solomon Islands custom concept interact to give the expressions a new meaning which is apt to the Solomon Islands context... However, other concepts of received law have not developed a customary law meaning and the use of expressions which denote those concepts can produce difficulties of some complexity. This is particularly so when the customs concept which they are said to represent are themselves undergoing modification to fit them to the requirements of a changing Solomon Islands which is now concerned not only with the use of land for subsistence farming but with the sale of timber on land and enclosure of land for cattle and so on... For this reason,..a Customary Land Appeal Court... through the experience of the majority of its members in custom concepts and the legal experience of its magistrate member, has the ability to participate in the welding of customary concepts and the English language in a way which will not overlay the custom with inadequately modified expressions which in time could result in the custom giving way to inappropriate and possibly undesirable concepts of received land law.

48. Although independence in Pacific countries gives the opportunity for the re-affirmation and restoration of traditional institutions and values into the existing legal system, a large number of new laws e.g. Company Law and Laws of Taxation, that have been leveloped, are not based or cannot be based on customary law as custom is not relevant to all sections of law. For example, claims made to incorporate and base new law on the traditional rules and concepts such as the customary ownership and rights to marine, land and coastal resources, or the incorporation of the notions of conservation and management of the resources, in practice, legal development is still largely influenced by the laws of England, Australia, New Zealand or elsewhere. Some laws can be found to be closely copied from these countries.

49. There is no shortage of assertions by independent countries in the Pacific that customary law should be recognised and applied and is part of the legal system. In practice however, customary law is not applied if it conflicts with any Act of Parliament or it is repugnant to natural justice, equity and good conscience. The recognition and application of customary law, again quoting Weisbrot, has "little impact on the system". Perhaps some of the gaps between customary laws and the existing legal systems are unbridgeable particularly if the task is to produce an integrated system of law based on national goals, judicial decisions, precedents and unwritten customary rules. But equally, custom still regulates many peoples lives in the Pacific even if it does not affect the formal legal system which may be largely irrelevant or ignored.

50. Lastly, the use of customary law without resorting to codification does not diminish its effectiveness. The advantage of non-codification is that it is flexible without becoming frozen and out of date on the law books. On the other hand, for the ease of modern administration, written legislation in such areas as land and titles has become a necessity, to protect such customs as, traditional fishing rights, clan membership etc. To codify customary laws could be advantageous for the branches of law that require certainty, but whether the advantages which codification brings is out-weighed by its inflexibility and rigidity is arguable as such laws can be altered with comparative ease by legislation.

VI. CUSTOMARY AND LEGAL TENURE.

51. The limitations in the environment in some Pacific countries prevents the economy from rising very far above a subsistence level. Subsistence activities are confined mostly to small scale agriculture,gardening, fishing, hunting and gathering. Tropical cyclones, floods, droughts, fresh water shortages, limited land resources in some countries all play a vital role in the lives of Pacific islanders.

52. The effective utilization of both land and sea resources is influenced by the range of traditional conservation and management practices not only for insurance against food shortages but also to ensure protection of plants, trees, animals, birds and sea life which play an important part in almost all ritualistic events. Hence the utilization, conservation and management of resources is one of the most complex activities of islanders. The number of taboos surrounding the fisherman and his techniques or the cultivator and his use of land demands not only a knowledge and familiarity with the location of the resources, the habits and habitats of species but the basis for accessibility and utilization is governed by complex systems of relationships, traditional ownership and rights.

53. When people speak of customary tenure or traditional tenure Crocombe[28] states that "they often imply that these were forms of tenure practiced by islanders of those localities before contact with industrialized societies. In that sense, there are no customary or traditional tenures in the Pacific islands...

> what is called customary or traditional tenure in many parts of the Pacific today may be more accurately called 'colonial tenure'; a diverse mixture of varying degrees of colonial law, policy, and practice with varying elements of customary practices as they were in the late ninteenth century after many significant changes had been wrought on the pre-contact tenures by steel tools, guns which facilitated larger-scale warfare, population decline, labour recruiting, increased mobility and absentee right holding, cash cropping and alienation in the post-contact but pre-colonial era. With the colonial era...many pre-contact Pacific tenures were abolished. Traditional tenures were designed for the non-existence of centralization...and to operate without written records.

54. Tension caused by conflict between customary law rights and the rights of the Crown or State is not uncommon in Pacific countries. The problem is not only juridicial but also political. National laws in some cases confirm customary rights exercised collectively or individually over lands, forest areas and fishing grounds and customary holders do not generally apply to the State for the recognition of their customary rights unless a procedure is laid down requiring them to do so. A system of registration or licence for the recording of rights, interest or title are some of the procedures laid down, but generally, failure to follow this procedure does not invalidate customary rights unless it is specifically invalidated by law.

55. Vigourous affirmation of customary rights has been the pattern in some countries since independence. In Vanuatu, the Constitution affirms the rights of 'custom owners' through the following provisions in the case of lands:-

> All land in the Republic belongs to indigenous custom owners and their descendants.
>
> The rules of custom shall form the basis of ownership and use of land in the Republic.
>
> Only indigenous citizens of the Republic who have acquired their land in accordance with a recognized system of land tenure shall have perpetual ownership of their land[29].

56. When customary rights are given formal recognition in national legislations a set of procedures is laid down (but not always) to enable these various rights to be recognized. For example in Fiji with regards to native lands, a system of registration is laid down for the recording of rights in the Register of Native Lands. In Rotuma, a system of registration of rights to land is laid down in the Rotuma Lands Act. The Act makes provision for the registration of any land in the Register as hanua ne kainaga, hanua pau or hanua ne 'on tore and these lands vest in those persons registered as owners. In the case of unowned land, such land vests in the Crown[30].

57. In spite of the recognition of customary rights and the

procedures by which these rights are recognized in the statutes, in practice, conflicts have arisen between 'custom owners' exercising their customary rights, and the rights exercised by the Crown or State, These are seen where the Crown alienates land for the purposes of public usage or for national development projects. It is not unusual to find the number of cases whereby 'custom owners' have protested the exercise of State rights (in violation of their customary rights) by blocking roads or hindering in some other way the entrances into development projects. The provocation could arise from the cutting down of mangroves which are the spawning grounds for small sea life, the clearing of medicinal trees and plants or the violation of sacred burial grounds of ancestors.

58. But some provisions also exist in the statutes for reconciling customary rights with the rights of the State. Drawing again on the Fiji example, any land required for public purposes may be acquired by the Crown "paying such consideration or compensation as may be agreed upon..."[31]. In some cases, where customary ownership rights and rights of the State cannot be reconciled the matter can be decided by the Court as illustrated in the Kiribati case of The Attorney-General v. The People of Banraeaba.[32]

> In this case the people of Banraeaba claimed for compensation from Government for the conversion of the area called Katibeka into fish ponds. The area in question was a sea inlet with a very narrow channel. In 1964 the Abaokoro Lands Court gave the people of Banraeaba permission to build a sea wall across the channel so as to reclaim the land. Government claimed that although the people had built a sea wall this was destroyed. The second sea wall was also destroyed but the people claimed that this did not extinguish their rights and that they fully intended rebuilding the sea wall. In 1975 The Lands Court Appeal Panel confirmed that the people of Banraeaba had built a sea wall and as a result had acquired rights over the area. Government had to pay compensation or rent for this area.

59. But whenever resources are alienated by the Crown or the State for public purposes or development projects, not always are the owners given due consideration or compensation, because the alienation of the resources is based on a basically different set of values manifested in the notion of public land. For example, Fiji's 1882 Rivers and Streams Act introduces this concept and makes the following provision:-

> All waters in Fiji which the natives have been accustomed to traverse in takias or canoes... and also those waters which are included by the term rivers by the law of England, shall with the soil under the same belong to the Crown and be perpetually open to the public for the enjoyment of all rights incident to rivers[33].

60. Traditionally, rivers and streams fronting a village are generally considered as 'owned' in some cultures by the inhabitants of the village. Exclusive ownership rights are claimed either by the chief, or families to defined areas such as water holes, mangrove patches, fish traps and fences, corrals and beds of rivers. But under Fiji's Rivers and Streams Act, the rights of persons living in villages or towns adjacent to rivers and streams are limited to full enjoyment as members of the public, but they can be given special rights to utilize rivers and streams for irrigation, industry, agriculture and domestic purposes.

61. Irrespective of legal or customary ownership rights, Government can possess land compulsorily during public emergencies or during any calamity that threatens the life or well being of the community[34]. In addition, any land left so called 'vacant' falls under the control of the Crown or State.

62. The exercising of ownership rights by the Crown or State therefore have in a number of cases conflicted with customary ownership and rights of the islanders to natural resources whether they be rights to lands, lagoons, mangroves, fishing grounds, reefs, forests, or the rights to the habitats of birds, wildlife and animals. Further detailed examination in individual countries would reveal the extent of the effects of conflicting rights on traditional practices relating to the protection of land and the marine environment.

VII. MAIN CATEGORIES OF CUSTOMARY RIGHTS AND PRACTICES IN RELATION TO LAND AND COASTAL RESOURCES

63. Note has been taken of the various statutes embodying 'rights and ownership according to native custom'. In some countries, Pacific islanders' claim to these resources are either exclusive, primary, secondary or mainly rights of occupation or utilization depending on the customary system. Exclusive rights are said to be handed down from time immemorial through ancestral families, spirits or Gods. The myths, legends and history of the Pacific are rich with references to their exclusive rights to these resources. Rights to these resources are generally held by all members of the kin group and where a system of chiefs or headmen exist the rights to the utilization of these resources are subject to their discretion.

64. According to Sahlins[35] 'to speculate about traditional proprietary rights of local kin groups from evidence collected in present circumstances is hazardous'. In his reference to land in Moala, Fiji, he states that

> the essential traditional proprietary privilege seems to have been that of cultivation where ones ancestors had made gardens. A key word is 'taukei', which means both 'owner' and 'native occupant' (of a place). It appears that through repeated clearing and the planting and use of trees, the rights of an ancestral family to enjoy a series of gardens ultimately became, for the group of descendents who continued use and those who 'stayed with' them, explicit rights to sections of land. A named group of successors of an ancestral family...was thus the 'owner' of several land tracts[36].

Ownership by kin group is limited to the privilege of using the land for livelihood and therefore their control and enjoyment of land was subject to the use by relatives for long or short periods and traditional boundaries of tracts and kin group holdings were subject to informal expansion and contraction.

65. The concept of unrestricted ownership rights to land and other natural resources is not found in all customary systems in the Pacific. Firth[37] in discussing tenure in Tikopia states that all lands held by any members of the clan is at the chief's disposal. Exercise of authority by the chief in order to guide utilization of economic resources by his people is seen in the imposition of tapu. This allows him from time to time to institute a 'closed season' for products and the restriction is obeyed not only

by his own clans-men but by all the people who have an interest in land where the tapu operates. However, a conservation tapu is not inviolable. If a man's garden appears to be concentrated in an area affected by the restriction, the man may take coconut and food for the chief and go to him. This act of notification does away with any offence.

66. Possession of the property in each case is validated by traditional associations which are partly historical and partly mythological. According to Firth[38] these do not take the form of a specific tale which is narrated as proof of title, but comprise a series of incidents which are interwoven into the general theme of the emergence of ... society. The titles are usually never questioned although boundaries could be in dispute. Various criteria govern the rights of individuals to natural resources, however flexible they may be. The network of social obligations, relationships and co-operation through clan and tribal organizations and backed by a system of supernatural sanctions, inheritance and ancestral interests does not only render stability but perpetuates the systems of ownership and rights as the people perceive them irrespective of the written law.

67. However, the introduction of the concept of public land developed by Colonial administrations has overriden traditional customary rights and practices in some areas, whilst in others the erosion of rights and practices have been influenced by commercial emphasis on cash cropping, wage employment, increased urbanization and migration. Therefore the impact on the habitats of wildlife, the loss of species, rare flora and fauna is significant due to increased forest clearing for agricultural or industrial development projects. Concern for the conservation of wildlife and rare species has been given protection in national legislations in some countries such as in Papua New Guinea where under the Fauna (Protection and Control) Act, wildlife management areas, sanctuaries and protected areas can be established on land held under customary tenure. In the case of wildlife, landowners form their own management committees to make rules to control the hunting of wildlife. Within designated areas, certain endangered wildlife, species such as the Birds of Paradise, Salvadori's Teal and the New Guinea Eagle can only be hunted by indigenous Papua New Guineans using traditional methods and for traditional non-monetary purposes.

68. The use of plants and trees for folk medicine, cosmetic oils, dance customs, handicrafts, canoe building and those

plants needed for rituals and magic purposes are restricted during certain seasons and may only be used at a particular stage of their life cycle. Sometimes, plants growing only in certain areas can be used for certain specified purposes. Traditional techniques of soil and water conservation, the management of soil erosion, drainage systems and agricultural patterns are all influenced by environmental conditions and social and cultural patterns of the society. According to Powell-:

> the social base on which the traditional management systems operate is generally an intergrated subsistence system in which individual roles are assigned and behaviour controlled by social, political and ritual practices and obligations to the group as a whole[39].

69. Traditional methods employed for the management of resources are usually, but not always conservational, for example, the practice of the taking of mangroves for firewood thereby affecting the habitat of water-life such as crabs and small fish. With the pressures of increased population and commercial expansion, examples can be found where traditional methods and practices have been overridden. This reduces the effectiveness of traditional resource management, conservation practices and the effectiveness of restrictions and taboos. Introduced legislation in certain areas has also eroded traditional practices and pays little attention to the whole concept of restrictions and taboos. There is an inadequate acknowledgement at present in the existing legal systems in the Pacific of some of the more useful conservation customs.

VIII.MAIN CATEGORIES OF CUSTOMARY RIGHTS AND PRACTICES RELATING TO MARINE RESOURCES

70. The decline in the importance of water rights in the Pacific for the last one hundred years has been due largely to the shift in emphasis from pearl shelling and berch-de-mer trade to intensive cash cropping and wage employment. Water rights became less important and there was less exploitation of the sea. But changing patterns today has given water rights a new importance because of the increase in population, the 200 mile exclusive economic zone and the increasing awareness of the marine environment as a major economic resource.

71. Increasing urbanization, migration and the emphasis on commercial practices and according to Johannes[40] 'several centuries of contact with continental colonizers' has eroded into traditional knowledge, skills and practices, He states, however, that there still remains an encyclopedic reservoir of practical sea lore. For example, many island fishermen know that year after year, a wide range of reef food , fish aggregate at specific locations to breed at particular seasons and at particular phases of the moon, or at a certain period of the year, sea birds, sea snakes, land crabs, or sea turtles could surface in particular locations on a fixed lunar, wind and tide cycle. Breeding grounds associated with such diverse and complex cycles are protected by the fishermen of the South Seas. The protection often taking the form of traditional taboos. He further states that-:

> in areas where recorded knowledge of local environment and biota is inadequate the knowledge possessed by amateur naturalists can play a vital role in siting protected areas. For the marine environments of the tropical Pacific islands, it is the local fishermen who possess this knowledge. Further, their customary patterns of marine resource use is essential in designing management programs compatible with local customs and sentiments[41]

72. Traditional fishing customs and practices are a useful means of control as the imposition of taboos towards fishing in certain areas in certain seasons is important in the application of the variety of measures to conserve and manage seafood. It is therefore important to understand customary rights and conservation and management practices so that they can be drawn together and reflected not only in

national legislations but in development plans and goals.

(a) Traditional ownership and rights

73. Crown or State ownership and rights to marine resources as presently reflected in national legislations in some Pacific countries has been a source of concern as in some cases they directly conflict with traditional concepts, ownership and rights to these resources. In others, customary rights to these resources are obliterated altogether. Moreover, customary rights to marine resources, conservational and mangement practices differ from one Pacific community to another. In Micronesia, the traditional concepts of ownership of the sea has been spelt out by Nakayama and Ramp.

> The overiding principle for defining rights to the sea is that proximity determines ownership. That is, paramount rights in the sea and its resources generally belong to the nearest island or atoll[42]

74. They state that the real focus of life is the sea as it provides food and tools and medium to transport an islander from one cluster of humanity to another. The rhythm of life is dictated by the sea. The lagoon area and the sea near the shore are the exclusive property of the island or atoll. The people maintain exclusive rights to all known adjacent submerged reef areas. The reefs are named and exclusively owned by particular families, clans, municipality, island, group of islands or atoll. But as one moves beyond the reef areas, the degree of exclusiveness of rights in the sea declines.

75. Traditional perception of rights to the sea in Micronesia is described in terms of two zones of rights, with criteria for defining the boundaries of the zones differing amongst the various cultural groups. An island or atoll maintains exclusive rights in the zone immediately around it. The Marshallese perceive this zone as extending as far out as a man can stand and fish. The central Carolinians perceive this zone to the point where the reef ecology gives way to deep sea species of fish; and the Yapese, Ponapaeans and Palauans extend this zone out to some vaguely defined point beyond the barrier reef.

76. In the outer zone although the island or atoll has the dominant rights, those rights are not exclusive. In Palau, the outer zone is said to extend out to a maximum range of

homing birds, 75 to 150 miles in the case of frigate birds. Among the central Carolinians the degree of rights within the outer zone extends towards the next island to the point where the rights of the next island become primary.

77. The Micronesians have an involved system of naming seas, reefs and lagoons they own and ownership rights are well respected and little poaching by Micronesians is believed to occur.

78. In other customary systems such as Tikopia, ownership of the lake and foreshore is regarded as the joint property of the four chiefs with the senior chief claiming the leading right. Use of the lake for fishing is by virtue of an individual or groups' relationship to the chief. The reef is not vested in any specific ownership but the areas fronting a village is worked by the local people. Proprietry interest is claimed where fish corrals are built and maintained by certain groups but this does not bar others from the use of them on obtaining permission[43].

79. In writing about customary ownership and rights to reefs in Vanuatu, Peter Taurakoto states that-:

> Ever since the islands were settled, the rights to fish around reefs and to land canoes on beaches have been regulated by custom. Reef boundaries were determined according to where one's ancestors landed or negotiated and how much land one owned above high water mark. According to Melanesian custom, boundaries extended as far out as one can fish or dive for shells. Those who do not own a reef may fish outside or deep beyond the boundaries. On Lelepa, there used to be six villages on the island and the reefs were regarded as the property of the six chiefs. On other islands such as South East Ambrym where reefs are scarce, the reefs are subdivided and the size of the division include the allocation of single rocks on the reefs to heads of families. Once allocation is made, families could only fish off the rock it had been allocated. Each head of the family also owns landing rights to the island of Lelepa, the rights being inherited from ancestors. Where people are prevented from landing on their own soil because of the danger of the reefs, landing places are allocated by the chiefs[44].

80. The Fijians under customary law also claim exclusive ownership rights to the sea, reefs, fishing grounds, foreshore, and the sea bed. The clan or kin group claim exclusive ownership not only to all land but also to fishing rights of its islands. Small uninhabited islands are also clan owned. Although there is no question as to the exclusive rights of ownership of the marine resources under Fijian customary law, the situation described in national legislations differ greatly. In the Fiji example, under the Rivers and Streams Act, already cited, all rivers and streams and the soil beneath are vested in the Crown for public purposes thus obliterating any traditional customary rights of ownership to them. Crown lands in Fiji not only include public lands but all foreshores and the soils under the waters[45].

81. Crown ownership of foreshores and soils under the water has posed special problems for customary ownership to mangrove areas. According to Baines

> the question of rights in mangrove areas is complicated by the fact that mangroves extend above and below mean high water mark[46].

He states that in the case of Fiji under the Deed of Cession the indigenous race (retained) certain traditional rights but this was subject to the crucially important rider...'so far as shall be consistent with British sovereignity'. This has been interpreted to mean that British tidal law should prevail in foreshore areas below mean high water mark. Fishing rights (not ownership rights) are recognised only in those areas of mangrove situated below mean high water mark and no other customary resource rights - to mangrove timber, for instance, have received any recognition.

82. Although under the Fisheries Act the Native Fisheries Commission has been 'charged with the duty of ascertaining what customary fishing rights in each Province of Fiji are the rightful and heredity property of native owners ... and institute inquiries into the title of all customary fishing rights...'[47] any one can fish in Fiji fisheries waters which includes customary fishing grounds. However, for trade or business purposes, a licence to fish must be obtained. Customary rights whether exclusive or primary, are affected by a registration and licencing system and is subject to the exclusive rights of the Crown to these resources.

83. The customary concepts of ownership and rights to marine resources and the varying conservation and management practices relating to the protection of the coastal and marine environment in the different countries in the Pacific

have been selected as examples to give broad indications of legal development in the Pacific and the current contributions of customary law and practices to development trends.

84. What is really in question is whether customary rights and practices relevant to the coastal and marine environment are adequately reflected in existing national legislation and whether they are implemented. The critical issues underlie the concepts of ownership and rights of the Crown or State and the traditional customary concept of ownership and rights to these resources. Added to this are the non-customary private rights of the freeholder and leaseholder to these resources. Unless these issues are reconciled, conflicts will continue to arise whether it be in fisheries development projects, the extraction of minerals from the seabed or the clearing of swamp land for health and sanitation reasons.

(b) Legislation

85. However, bodies of legislation do exist in some of the countries which give protection to the marine environment. For example, the Marine Spaces Act of Fiji, the Marine Resources Act of Nauru, the Delimitation of Marine Waters Act of Solomon Islands, the Conservation Act of the Cook Islands makes provision for the protection, preservation and exploitation of the marine environment of the exclusive economic zone and the conservation and management of fisheries resources.

86. The Fisheries Regulations of Fiji controls the use of fish fences, nets, poison; and protects turtles, crabs, shells, porpoises and dolphins. The Trochus Act of the Cook Islands prohibits the fishing for trochus shells without a licence within the three fishing reserves of Aitutaki, Palmerston and Manuae. In Tonga, the Whale Industry Act provides for the protection of whales from being caught, wounded, killed or taken and in 1978 an indefinite moritorium was imposed on the catching of the humpback whale. Provision is also made for a total ban on turtle catching during the designated breeding seasons. Tonga also has five designated marine national parks in which all lagoon life, coral, and beach sands are fully protected.

87. In general, traditional conservation and management practices relating to marine resources are primarily to ensure the availability of subsistence foodstocks and for

rituals and ceremonial purposes. Protection is by way of taboos during closed seasons and restrictions in certain fishing grounds particularly during breeding periods; and taboos that apply to certain communities or families from eating certain forms of marine life such as turtles, sharks or certain species of fish or shell fish although these restrictions are not altogether associated with conservation practices but also with rituals and magic.

IX. CONCLUSION

88. It is obvious that further research will be of great value to advance our understanding of the role and scope of customary law and practices relevant to the environment in the process of change. Some progress has been made in environmental studies in the Pacific islands through various writings and conferences as the Pacific environment becomes more important politically and economically.

> To the Pacific Islander, his environment is a resource, a homeland and a means of identity. It is all this and more to an islander, and the depth of his attachment to his environment is not easy to measure. And what happens to his environment is very much a matter of keen concern to an islander, particularly those on very small islands, with strictly prescribed resources[48].

89. A number of writers have implied that the problems facing the people of the Pacific today arise from the processes of social, economic and political changes but that these processes have also solved some problems that have existed before. Some go further and state that Pacific people can solve many of their problems of adapting their culture to the needs of modern times by abandoning or modernizing their traditional land tenure systems, communal obligations, customary rights to the marine environment, ritual and taboos in order to compete with the outside world and progress towards a richer commercial economy.

90. According to Lasaqa[49] these statements are not new, nor are they difficult to make. What is more difficult to spell out is its implications in detail especially as it effects groups and inter-personal relations, social structures and value systems, use of time and resources, local leadership and the peoples view of themselves and the world around them. Customs, communal living and traditional systems are seen as serious threats to development. As if Pacific islanders have no development theory in their own environment, development potentials only related to a moneterized economy is encouraged. This however, does not develop the full basis for the people to attain a good and satisfying quality of life.

91. An attempt has been made to define the basic elements and the relationship that exists between the traditional systems of law and practices with specific references to the environment and the various statutes within the existing legal systems and the consequences of this relationship. A brief view of the existing legal systems has been given to dispel the views generally held that Pacific islanders live within a simple system. It is not so simple when one considers not only the interlocking systems of inherited law but also the complexities of traditional law and practices; the practical problems that surround State or Crown ownership rights and ownership rights and practices in customary law. This is a critical area as it directly affects man's relationship to the environment. The different status accorded to customary law in national constitutions and the status accorded by the courts to customary law; the problems of interpretation and the use of western terminologies and language; the difficulties involved in the ascertainment of customary rights to marine resources such as the rights to reefs, lagoons, fishing grounds, foreshore and mangroves; the registration of rights and the consequences of alienation by the Crown or State.

92. Several legal statutes have been selected for examination but on their own their value is limited without indicating in practice the extent of their operation. With newly independent countries it would be difficult to assess at this stage the implications and operations of recent legislations such as the land legislation in Vanuatu and its effect not only on the customary law system but on the society and national development goals.

93. However, economic changes affecting customs and practices would indicate the necessity for careful

examination of both the existing law and the traditional law and practices. Development issues affecting traditional water rights in relation to hydro electricity; the value of bait-fish in-shore; tuna fishing within the exclusive economic zones; beachside communities and their customary rights to the sea and the future issues of wave power development are some areas where considerable conflict may arise.

94. In spite of the changes brought about in the written law to regulate or obliterate some of the basic customary law and practices of the people, the complex traditional systems of environmental management tend to continue regardless of these changes. The existence and continuation of the body of customary law and practices not only serve to maintain tradition, but can also be effectively linked into the nexus of development and protection of the environment. The integration of traditional environmental management laws into the arena of the legal and economic systems needs to be examined in order to produce a more comprehensive environmental protection package for the Pacific. Customary law, practices and institutions cannot yet be replaced by written legislations, administrative directions and formal courts as customary law continues to be

> the primitive counterpart of a Record Office in which parchment has not yet replaced the memory of men[50].

REFERENCES

ATT. I

1. See SPREP Topic Review 13. An Overview of Environment Legislation in the South Pacific Countries. by S. Venkatesh & S. Va'ai.

2. Narakobi, Bernard, 1980. The Melanesian Way. p.92. Koon Wah Printing Pte. Ltd.

3. Kobben. Andre J.F. 1969. Law at the Village Level ; The Cottica Djuka of Surinam. In Nader. L. (ed.), Law in Culture and Society. p. 120. Aldine Publishing Co. Chicago.

4. Ibid. p.120

5. Ibid. p.130

6. Laws of Fiji (1978 ed.) Fijian Affairs Act cap. 120. Some of the laws in force include :-Fijian Affairs (Safty at Sea) Regulations;Fijian Affairs (Boundaries) Regulations; and various Provincial Public Health By-laws.

7. Laws of Fiji (1978 ed.) Banaban Settlement Act. cap 123. Laws in force include:- Rabi Island (Animals) Regulations; Rabi Island (Cultivation and Burning of Land) Regulations; Rabi Island (Buildings, Villages and Sanitation) Regulations.

8. Laws of Fiji (1978 ed.) Rotuma Act. cap. 122. Other laws include Rotuma Lands Act; Rotuma (Coconut Plantation) Regulations; Rotuma (Destruction of Trees) Regulations.

9. An Act to make Fresh Provisions for Civil Aviation in Tonga. The New Zealand Regulations to have effect as part of the Laws of Tonga.

10. Lundsgaarde, H.P. Some Transformation of Gilbertese Law 1892-1966. p.117

11. Ibid. p.118

12. Nyali Ltd. v. Attorney-General (1956) Q.B. Division. p. 16-17.

13. op.cit., p.117

14. The Constitution of Papua New Guinea. See Schedule II.2.

15. The Constitution of Solomon Islands. Article 76. See also Schedule 3.

16. The Constitution of Vanuatu. Articles 45 and 49.

17. Weisbrot. David. Customizing the Common Law. The True Papua New Guinea Experience. American Bar Association Journal. June 1981. p. 728.

18. Cook Islands Act 1915. section 422.

19. Laws of the Republic of Nauru. See Custom and Adopted Laws Act 1971. section 3. See also Nauru Lands Committee Ordinance 1956-1963.

20. The Gilbert Islands Law Reports 1978. p. 58-61.

21. See N.A. Ollennu (1962) Customary Land Law in Ghana. p.xiv. Sweet & Maxwell.

22. Maude, H.E. 1963. The Evolution of the Gilbertese Boti. p.6.

23. Ibid, p.6.

24. Laws of Solomon Islands. Cap. 93.

25.(a) The Gilbert Islands Law Reports 1978 p. 58-61.

26. Laws of Fiji (1978 ed.) Native Lands Act. cap. 133. section 3.

27. The Solomon Islands Law Reports 1980/81. p. 233-234.

28. Crocombe. Ron. Customary Tenures and Incentives to Produce U.S.P. Extension Services Course Guide. Land Tenure. Vol. 2. p. 284

29. The Constitution of Vanuatu. Articles 71 and 72.

30. Laws of Fiji (1978 ed.) Rotuma Lands Act. cap. 138. section 10. See also section 2 for Interpretation,

Hanua ne Kainaga means land held by that family community of Rotumans known as Kainaga, the members of each kainaga holding land in undivided ownership and the acknowledged head of the family being the pure (or overlord) of the land.

Hanua Pau means land which is vested is a single individual Rotuman by sale or gift or by an instrument deposited with the District Officer with the intention of creating Hanua Pau.

Hanua ne 'On Tore means land which is vested on intestacy in the first, second and third generations of decendants of a deceased owner of Hanua Pau, as Hanua ne 'On Tore, when there is no single individual Rotuman in whom the land vests as Hanua pau. Descendants take life interest in undivided shares in such land, and the last survivor of them taking the land as Hanua Pau.

31. Laws of Fiji (1978 ed.) Crown Acquisition of Lands Act. cap. 135. section 3.

32. See M.C.L.A. 9/82. Judgement of Chief Justice J.R. Jones CBE. on 7/5/82.

33. Laws of Fiji (1967 ed.) Rivers and Streams Act. cap. 121. section 2.

34. Laws of Fiji (1978 ed.) Crown Acquisition of Lands Act. cap. 135. section 8.

35. Sahlins. Marshall, D. 1962. Moala. Culture and Nature of a Fijian Island, p. 271. University of Michigan Press.

36. Ibid. p. 277.

37. Firth. Raymond. 1936. We, The Tikopia. Kinship in Primitive Polynesia. p. 364-366. Beacon Press. Boston.

38. Ibid. p. 342.

39. Powell, Jocelyn. M. Traditional management and Conservation of Vegetation in Papua New Guinea. See Monograph 16 Traditional Conservation in Papua New Guinea : Implications for Today. p. 125. Eds, Louise Morauta, John Pernetta and William Heaney.

40. Johannes. R.E. Traditional Conservation Methods and Protected Marine Areas in Oceania. See AMBIO. Vo. II, No. 5. p. 258.

41. Ibid. p. 258.

42. Nakayama. M. and Ramp. F. Micronesian Navigation Island Empires and Traditional Concepts of Ownership of the Sea. U.S.P. Extension Services Course Guide. Vol. II Land Tenure. p. 252-257.

43. Firth. Raymond. 1936. We, The Tikopia. Kinship in Primitive Polynesia. p. 364. Beacon Press. Boston.

44. Taurakoto. Peter. Customary Rights to Reefs and Landings. in Land Tenure in Vanuatu. 1984. (Ed. Peter Lamour) p.14 & 15.

45. Laws of Fiji (1978 ed.) Crown Lands Act. cap. 132. section 2.

46. Baines. Graham.B.K. Mangroves for National Development : A Report on the Mangrove Resources of Fiji. March 1979. p.16.

47. Laws of Fiji (1978 ed.) Fisheries Act. cap. 158. sections 14 and 15.

48. Lasaqa. I. Environment, Development and Research in the Island Pacific. p. 2.

49. Lasaqa. I. 1973. Geography and Geographers in the Changing Pacific ; An Islander's View. In Harold Brookfield (ed.), The Pacific in Transition. p. 299-311. ANU Press.

50. Firth. Raymond. 1936. We, The Tikopia. Kinship in Primitive Polynesia. p. 342. Beacon Press. Boston.